

A Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP
PETITION NO D1-28-311 OF 1996
VINCENT NG J
18 AUGUST 2003

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Civil Procedure — Judgments and orders — Consent order — Setting aside — Want of authority — Whether part of consent order ought to be set aside for want of authority by counsel — Whether lack of authority by counsel a ground for setting aside consent order

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Companies and Corporations — Winding up — Petition to wind up — Whether court had jurisdiction to make any order other than to wind up respondent company — Whether court could record consent order — See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598

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The petitioner had presented a petition to wind up the respondent. The petition was contested by the respondent and six opposing contributories, the latter including the applicants. The parties reached an amicable settlement and a consent order was recorded allowing the Petitioner to withdraw the petition with liberty to file afresh and providing for the sale of certain assets by the petitioner to the respondent and the opposing contributories. This was an application by way of motion by two opposing contributories ('the applicants') seeking to set aside the part of the said consent order requiring the applicants to purchase the said assets. The applicants averred that their instructions to their solicitors had been limited to opposing the winding up petition. At no time were the solicitors authorised to enter into the consent orders. The applicant further averred that, following the decision in *See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 (CA), the only final order the court could have made was to direct a winding up of the respondent company or to dismiss the petition. The court had exceeded its jurisdiction when it allowed the parties to record the consent order. Counsel for the petitioner raised an objection as to the mode of procedure adopted by the applicants to move the court to set aside the consent order, which had then yet to be perfected.

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Held, dismissing the application:

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- (1) Prior to the perfection of a consent order or judgment there was a limited jurisdiction to set aside such an order or judgment. The court would interfere only if the evidence indicated that counsel had been acting in excess of authority, either deliberately or inadvertently, or had been labouring under a mistake, such which would vitiate the agreement. A party seeking to set aside such an unperfected consent order could do so by summons or notice of application prior to or contemporaneously with the perfection of the order. The applicants were thus not amiss in making their application by motion (see para 25).
- (2) Counsel's alleged lack of authority was invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the

- client could be resolved in the context of a claim against his counsel. There was no obligation to prove express authority. Solicitors or counsel, by implication, had authority to compromise an action. The petitioner and the court were entitled to assume the existence of such authority when the lack of such authority was not specifically brought to their attention at the material time (see para 11); *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381 followed. **A**
- (3) The applicants had then been represented by the same solicitors who had appeared for the respondent and the other opposing contributories in the winding up proceedings. A single set of affidavits had been filed on behalf of the respondent and the opposing contributories, including the applicants. The fact that negotiations took place over a period of three days clearly showed that all the contributories had authorized their counsel and solicitors to negotiate and conclude a settlement. There was no affidavit from the applicants' former counsel, solicitors, the respondent or the other contributories as to any lack of authority (see paras 7, 9–10, 13); *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613 followed. **B**
- (4) The fallacy of the applicants' contentions became more apparent in considering that the applicants were seeking to invalidate only the portion of the consent order which related to their obligations whilst requiring the petitioner and the respondent to fulfill theirs. The applicants alleged that their solicitors had sufficient authority to consent to a part of the order and not to the rest of the order. Consent and authority cannot, by any stretch of rational reasoning, be divisible. Equity would not allow the applicants to retain the benefit of the consent order without bearing the burden that accompanied that benefit (see paras 12, 14); *Yee Seng Plantation Sdn Bhd v Kerajaan Negeri Trengganu* [2000] 3 MLJ 699 referred. **C**
- (5) The true ratio in *See Teow Guan* has been misconstrued by counsel and misapplied by the courts. The ratio in *See Teow Guan* is based on the majority decision in *Re Rf Jowsey Mining Co Ltd* [1969] 2 OR 549; 1969 Ont. Rep Lexis 152, Jessup JA dissenting. This court was completely ad idem with and preferred the minority view on the matter. In *See Teow Guan* the petitioner had presented a petition in the High Court seeking that the company 'be wound up by the court'. This court was however bound to adopt the ratio in *See Teow Guan* (see paras 17, 19). **D**
- (6) However in recording the consent order, the court had not exercised its adjudicatory function. Rather the court was merely giving due recognition to an agreement arrived at between the parties. The applicants' implied concession that the court has jurisdiction to hear a winding up petition, but has no power to record a consent order on the same was untenable and wholly without basis in law. The High Court is a superior court of record and was not debarred from recording such an order (see paras 20–21); *See Teow Guan v Kian Foo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 distinguished; *Lee Kee* **E**
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- A** *Choong v Empat Nombor Ekor (NS) Sdn Bhd* [1975] 1 MLJ 134 and *KI Muhideen v KEP Mohd Abdul Kassim* [1959] MLJ 257 referred.
- (7) The withdrawal of the petition, the part of the order intended by applicants to be retained, would have entailed the company, a going concern, to suffer liabilities and its creditors to acquire third party rights against the company. The applicants cannot be allowed to create a new right or to resuscitate an extinguished right in their favour against a third person, or to create, on the part of a third person, a new liability. Indeed, a judgment or order may not be set aside by consent of the parties if it would prejudice third party rights ice third party rights (see paras 26–27); *Hammond v Schofield* (1891) IOB 453 followed; *The Bellcairn* (1885) 10 PD 161 referred.
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[Bahasa Malaysia summary]

- Pempetisyen telah mengemukakan satu petisyen untuk menggulungan responden. Petisyen tersebut telah dipertikaikan oleh responden dan enam penyumbang pembangkang, yang mana termasuklah pemohon-pemohon. Pihak-pihak telah mencapai satu penyelesaian secara persahabatan dan satu perintah persetujuan telah direkodkan membenarkan pempetisyen menarik balik petisyen tersebut dan bebas untuk memfailkan yang baru dan memperuntukkan untuk jualan aset-aset tertentu oleh pempetisyen kepada responden dan penyumbang-penyumbang pembangkang. Ini adalah permohonan melalui usul oleh dua penyumbang pembangkang ('pemohon-pemohon') yang memohon untuk mengenyepikan sebahagian daripada perintah persetujuan yang menghendaki pemohon-pemohon membeli aset-aset tersebut. Pemohon-pemohon menegaskan bahawa arahan mereka kepada peguamcara mereka adalah untuk membangkang petisyen penggulungan tersebut. Tidak pada bila-bila masa peguamcara-peguamcara tersebut diberi kuasa untuk memasuki perintah-perintah persetujuan tersebut. Pemohon selanjutnya menegaskan bahawa, mengikut keputusan dalam *See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598, satu-satunya perintah muktamad yang mahkamah boleh buat adalah untuk mengarahkan penggulungan syarikat responden atau untuk menolak petisyen tersebut. Mahkamah telah melampaui bidang kuasanya apabila ia membenarkan pihak-pihak merekodkan perintah persetujuan tersebut. Peguam bagi pihak pempetisyen telah menimbulkan satu bantahan berhubung cara prosedur yang digunakan oleh pemohon-pemohon untuk memohon mahkamah mengenyepikan perintah persetujuan tersebut, yang mana masih belum disempurnakan.
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Diputuskan, menolak permohonan tersebut:

- (1) Sebelum penyempurnaan perintah persetujuan atau penghakiman terdapat bidang kuasa terhad untuk mengenyepikan perintah atau penghakiaman sedemikian. Mahkamah akan campur tangan hanya jika keterangan menunjukkan bahawa peguam telah bertindak melampaui kuasa, sama ada secara sengaja atau tidak, atau telah bertindak di bawah satu kesilapan, yang akan membatalkan perjanjian
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- tersebut. Pihak yang memohon untuk mengeneipkan perintah persetujuan yang tidak sempurna boleh juga berbuat demikian melalui saman atau permohonan notis sebelum atau sejajar dengan penyempurnaan perintah tersebut. Pemohon-pemohon oleh itu tidak salah dalam membuat permohonan mereka melalui usul (lihat perenggan 25).
- (2) Peguam yang dikatakan tidak mempunyai kuasa tidak langsung merupakan alasan untuk mengeneipkan perintah persetujuan atau kontrak. Apa-pa ketidakadilan yang dialami oleh anakguam boleh diselesaikan dalam konteks tuntutan terhadap peguamnya. Tiada obligasi untuk membuktikan kuasa nyata. Peguamcara atau peguam, secara implikasi, mempunyai kuasa untuk menentukan satu tindakan. Pempetisyen dan mahkamah berhak untuk membuat anggapan terdapat kuasa sedemikian apabila kekurangan kuasa sedemikian tidak dikemukakan secara khusus kepada perhatian mereka pada masa matan (lihat perenggan 11); *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381 diikuti.
- (3) pemohon-pemohon pada masa itu telah diwakili oleh peguamcara-peguamcara yang sama yang hadir bagi pihak responden dan penyumbang pembangkang yang lain dalam prosiding penggulangan tersebut. Satu set affidavit telah difailkan bagi pihak responden dan penyumbang-penyumbang pembangkang tersebut, termasuklah pemohon-pemohon. Hakikat bahawa perundingan telah diadakan sepanjang tempoh tiga hari jeals menunjukkan bahawa semua penyumbang-penyumbang tersebut telah memberi kuasa kepada peguam dan peguamcara-peguamcara mereka untuk berunding dan mencapai satu penyelesaian. Tiada sebarang affidavit daripada bekas peguam pemohon-pemohon, peguamcara-peguamcara, reponden atau penyumbang-penyumbang lain berhubung kekurangan kuasa (lihat perenggan-perenggan 7, 9–10, 13); *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613 diikuti.
- (4) Salah anggapan berhubung niat pemohon-pemohon semakin jelas dalam mempertimbangkan bahawa pemohon-pemohon sedang memohon untuk mentaksahkan hanya bahagian perintah persetujuan yang berkaitan obligasi-obligasi mereka sementara menghendaki pempetisyen dan responden memenuhi obligasi-obligasi mereka. Pemohon-pemohon mengatakan bahawa peguamcara-peguamcara mereka mempunyai kuasa yang mencukupi untuk menyetujui kepada sebahagian perintah tersebut dan tidak kepada bahagian lain dalam perintah tersebut. Persetujuan dan kuasa tidak boleh, berdasarkan apa-apa alasan rational, boleh dibahagikan. Ekuiti tidak akan membenarkan pemohon-pemohon memperoleh faedah perintah persetujuan tersebut tanpa menanggung beban yang diperolehi daripada faedah tersebut (lihat perenggan-perenggan 12, 14); *Yee Seng Plantation Sdn Bhd v Kerajaan Negeri Trengganu* [2000] 3 MLJ 699 dirujuk.

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- A** (5) Ratio sebenar dalam *See Teow Guan* telah disalah tafsir oleh peguam dan disalah pakai oleh mahkamah. Ratio dalam *See Teow Guan* adalah berdasarkan keputusan majoriti dalam *Re Rf Jowsey Mining Co Ltd* [1969] 2 OR 549; 1969 Ont Rep Lexis 152, Jessup JA menentang. Mahkamah ini sepenuhnya ad idem dengan dan lebih kepada pendapat minoriti berhubung perkara tersebut. Dalam *See Teow Guan*
- B** pempetisyen telah mengemukakan satu petisyen di Mahkamah Tinggi memohon syarikat 'be wound up by the court'. Mahkamah ini bagaimanapun telah memakai ratio dalam *See Teow Guan* (lihat perenggan-perenggan 17, 19); *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 3 CLJ 361 dirujuk.
- C** (6) Namun begitu dalam merekodkan perintah persetujuan tersebut, mahkamah tidak menggunakan fungsi penghakimannya. Bahkan mahkamah hanya memberikan pengikhtirafan kepada persetujuan yang dicapai antara pihak-pihak tersebut. Konsesi pemohon-pemohon yang dikatakan tersebut bahawa mahkamah mempunyai bidang kuasa untuk mendengar petisyen penggulangan, tetapi tiada
- D** kuasa untuk merekodkan perintah persetujuan pada yang sama tidak boleh dikekalkan dan keseluruhannya tidak berasas dalam undang-undang. Mahkamah Tinggi adalah mahkamah tertinggi dan tidak dihalang daripada merekodkan perintah sedemikian (lihat perenggan-perenggan 20–21); *See Teow Guan* dibeza; *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd* [1975] 1 MLJ 134 dan *KI Muhideen v KEP Mohd Abdul Kassim* [1959] MLJ 257 dirujuk.
- E** (7) Penarikan balik petisyen, bahagian perintah yang diniatkan oleh pemohon-pemohon dikekalkan, akan menyebabkan syarikat tersebut, yang diberi perhatian, mengalami liabiliti-liabiliti dan pemiutang-pemiutangnya untuk memperoleh hak-hak pihak ketiga terhadap syarikat tersebut. Pemohon-pemohon tidak boleh dibenarkan membentuk satu hak baru atau mewujudkan semula satu hak yang telah lenyap menyebelahi mereka terhadap pihak ketiga, atau membentuk, bagi pihak orang ketiga, liabiliti baru. Sememangnya, satu penghakiman atau perintah tidak boleh diketepikan dengan persetujuan pihak-pihak jika ia akan memprejudiskan hak pihak ketiga
- F** (lihat perenggan-perenggan 26–27); *Hammond v Schofield* (1891) IOB 453 diikuti; *The Bellcairn* (1885) 10 PD 161 dirujuk.]
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Notes

- H** For cases on consent orders, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3464–3474.
For cases on petition to wind up, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152–1219.

I Cases referred to

Aspden (Inspector of Taxes) v Hildesley [1982] 1 WLR 264 (refd)
Bellcairn, The (1885) 10 PD 161 (refd)

- Binder v Alachouzos* [1972] 2 All ER 189 (refd) **A**
Brister v Brister [1970] 1 WLR 664 (refd)
Croft v Croft [1922] 38 TLR 648 (refd)
ER Ives Investment Ltd v High [1967] 2 WLR 790 (refd)
European Grain & Shipping Ltd v Johnson Ltd [1982] 2 Lloyd's Law Repts 550 (refd)
Green v Rozen [1955] 2 All ER 797 (refd) **B**
Hammond v Schofield (1891) IOB 453 (folld)
Horizon Technologies International Ltd v Lucky Wealth Consultants Ltd [1992] 1 WLR 24 (refd)
Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd [2000] 6 MLJ 493 (refd)
Jessel v Jessel [1979] 1 WLR 1148 (refd) **C**
KI Muhiudeen Razwther v KEP Abdul Kassim & Ors [1959] MLJ 257 (refd)
Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd [1975] 1 MLJ 134 (refd)
Leow Seng Huat v Low Mui Yein [1996] 5 MLJ 381 (folld)
Lewis v Lewis (890) 45 ChD 281 (refd) **D**
Lievesley v Gilmore [1866] LR1 CP 570 (refd)
Marsden v Marsden [1972] Fam Law 280 (refd)
Rf Jowsey Mining Co Ltd, Re [1969] 2 OR 549; 1969 Ont Rep Lexis 152 (refd)
See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (distd) **E**
Shaw, Re [1918] P 47 (refd)
Smith v Shirley & Bayliss [1875] 32 LT 234 (refd)
Sourendra Nath Mitra & Ors v Tarubala Dasi [1930] 57 Indian Appeals 133 (refd)
Teh Eok Kee & Anor v Tan Chiah Hock & Anor [1995] 3 MLJ 613 (folld)
Thrope v Fasey [1949] 1 Ch 649 (refd) **F**
Tong Lee Hwa & Anor v Chin Ah Kwi [1971] 2 MLJ 75 (refd)
Waugh v HB Clifford & Sons Ltd [1982] Ch 374 (refd)
Wondoflex Textiles Pty Ltd, Re [1951] VLR 458 (refd)
Worthington & Co v Abbot [1910] 1 Ch 588 (refd)
Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699 (refd) **G**

Legislation referred to

- Companies Act 1965 ss 218(1), 221(1)
 Corporations Act, RSO 1960 [Canada] s 256(d) **H**
 National Land Code
Hamid Sultan Hamid Sultan (Loga Chitra & Assoc) for applicants/opposing contributories.
Dato' RR Sethu (NH Wong with him) (NH Wong & Assoc) for respondent/petitioner. **I**
Alan Chua (Alan Chua & Co) for respondents/remaining opposing contributories.

A Vincent Ng J:

Preamble

B [1] This notice of motion (encl 20) is an application before me by two opposing contributories, namely Lee Lay Leng and Lee Lay Wee ('the applicants') seeking to set aside the consent order dated 18 April 2000 be set aside with costs to be borne by the petitioner.

C [2] Briefly, the background facts of this case show that the petitioner presented a petition to wind up the respondent pursuant to s 218(1) of the Companies Act 1965 ('the Act'). The petition was contested by the respondent and six opposing contributories including the applicants. However, parties reached an amicable settlement and a consent order was recorded on 18 April 2000 before Mohd Ghazali J (as he then was), inter alia, allowing the petitioner to withdraw the petition with liberty to file afresh and providing for the sale of certain assets held by the petitioner to the respondent and the opposing contributories.

D [3] The consent order has yet to be perfected.

The application

E [4] The applicants' subsequent objection to the consent order dated 18 April 2000 is limited to prayer 4 therein. The relevant portions of the said consent order are reproduced below for ease of reference:

... IT IS HEREBY ORDERED BY CONSENT as follows:

...

F (4) The Opposing Contributors shall jointly and severally purchase the Assets from the Petitioner at the total purchase consideration of Ringgit Malaysia Ten Million (RM10,000,000) only (hereinafter referred to as the 'Purchase Price') and shall pay the Purchase Price in the following manner:

G (a) Ringgit One Million Five Hundred Thousand (RM1,500,000) (hereinafter referred to as the 'Deposit') shall be paid by the Opposing Contributors to the Petitioner on or before 18th June 2000; and

H (b) the balance of Ringgit Eight Million Five Hundred Thousand (RM8,500,000) (hereinafter referred to as the 'Balance Sum') shall be paid within thirty (30) months from 18th June 2000 in five (5) equal installments of Ringgit One Million Seven Hundred Thousand (RM1,700,000), the first installment to be paid on or before the 18th day of each sixth month,

until full payment of the Purchase Price.

I [5] The application is premised on two grounds:

- (i) that applicants had not authorized their solicitor to enter into any consent order with the petitioner; and
- (ii) that the court had no jurisdiction to grant the consent order.

[6] It is noteworthy that neither the respondent nor any of the other opposing contributories have any objections to this application. **A**

FIRST GROUND

[7] The applicants were represented by the same solicitor who appeared for the respondent and the other opposing contributories in the winding up proceedings. **B**

[8] The applicants averred that their instruction to the solicitor was limited; merely to opposing the winding up petition. At no time was the solicitor authorized to enter into any consent orders. **C**

[9] I find that this issue is without substance and doomed to failure in the face of evidence to the contrary and the fact that negotiations among all the parties took place over a period of three days. Indeed, there is no affidavit from the applicants' former counsel, solicitor, respondent or other contributories as to the lack of authority. **D**

[10] The applicants' complaint of alleged lack of authority of their counsel and solicitor is without substance, as there is no affidavit from their counsel, solicitor, respondent or other contributories as to the lack of or for misapprehension of his authority (see *Lewis v Lewis* (890) 45 ChD 281). And, the fact that negotiation took place over a period of three days clearly showed that all the contributories had authorized their counsel and solicitor to negotiate and conclude a settlement. Counsel and solicitor in the ordinary course of their retainer have the power to enter into compromise or settle disputes (see *Sourendra Nath Mitra & Ors v Tarubala Dasi* [1930] 57 Indian Appeals 133 at pp 138, 139–140, 141, 142 per Lord Atkin; *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613). In the course of his judgment in *Waugh v HB Clifford & Sons Ltd* [1982] Ch 374, Brightman LJ reviewed a number of the authorities referred to in the foregoing discussion on implied authority and said this (at p 387): **E**

The law has become well established that the solicitor or counsel retained in an action has an *implied* authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action'; and *ostensible* authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority, subject to the same limitation ... **G**

[11] Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel (see *Waugh v HB Clifford & Sons Ltd*; *Leow Seng Huat v Low Mui Yein* [1996] 5 MLJ 381, at p 385E–H). There is no obligation to prove express authority. A solicitor or counsel by implication had authority to compromise. The petitioner and the court, are entitled to assume the existence of authority when the lack of authority is not specifically brought to the attention of the petitioner or the court at that material time. **H**

I

- A** [12] At any rate, the plea of lack of authority on the part of the applicant's former solicitors in support of the motion is inconsistent with the contention that whilst a part of the consent order is valid, the other is invalid. In the face of the averments in their affidavit, are the applicants now saying that their solicitors had authority to consent to a part of the order and not to the rest of the order? At any rate, in my view, consent and authority
- B** cannot, by any stretch of rational reasoning, be divisible. A further consideration is that equity would not allow the applicants to retain the benefit (of the withdrawal and dismissal of the petition) without the burden that accompanies that benefit, namely, the purchase of the petitioner's share (see *ER Ives Investment Ltd v High* [1967] 2 WLR 790 and *European Grain & Shipping Ltd v Johnson Ltd* [1982] 2 Lloyd's Law Repts 550) — a fortiori
- C** where the parties cannot be restored to the status quo ante (see *Thorpe v Fasey* [1949] 1 Ch 649).

- D** [13] A perusal of the cause papers revealed that a single set of affidavits were filed on behalf of the respondent and the opposing contributories, including the applicants. This was consistent with the fact the respondent and the opposing contributories shared a common or joint interest in the company. The consent order itself set out lucidly the inter-dependant obligations of each party to the proceedings on a *quid pro quo* basis. The sale of the company assets to the opposing contributories, including the applicants, was a fundamental and integral part of the whole settlement between the parties, such that the respective obligations are intimately interdependent.
- E**

- F** [14] The fallacy of the applicants' contentions became more apparent, considering that the applicants were seeking to invalidate only the portion of the consent order that relates to their obligations whilst requiring the petitioner and the respondent to fulfill theirs (see *Thorpe v Fasy*). Indeed, even when a State Government sought to set aside the whole of a consent order on the ground of lack of authority of counsel — and alleged contravention of the National Land Code that impinged on the power of the State authority to alienate — it was refused by the Court of Appeal (see *Yee Seng Plantation Sdn Bhd v Kerajaan Negeri Trengganu* [2000] 3 MLJ 699).
- G** This application to sever parts of the consent order some 14 months after the same was recorded, only serves to bring to light the fact that the applicants had indeed consented to the whole order which they now seek this court's sanction to renege on its terms.

H SECOND GROUND

- I** [15] The application is primarily grounded upon the ratio in the decision of the Court of Appeal in *See Teow Guan v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598, wherein, Gopal Sri Ram JCA who delivered the judgment of the Court of Appeal had expressed the following views:

I must confess that, despite the rather wide words appearing in s 221(1) of the Act, the only *final* order a companies court may make is either to direct a winding up or to dismiss the petition. It may certainly make interim orders, eg by

appointing a provisional liquidator or a receiver and manager pending the final disposal of the petition. But, as I have said, it is not my comprehension of the law governing the winding up of companies that a court hearing a petition may make an order as to the distribution or disposal of the assets of a company. And, as I have since discovered, the point is covered by authority.

[16] The applicants argued that s 221(1) of the Act merely empowered the court hearing a winding up petition to either direct the winding up of the said company and to make the necessary ancillary orders in support thereof or to dismiss the petition. Therefore, they submitted, that the court clearly exceeded its jurisdiction when it allowed the parties to record the consent order on 18 April 2000.

[17] This submission finds no favour with me. Regrettably, I have to observe here that the true ratio in *See Teow Guan* has, ever so often, been misconstrued by counsel and sometimes misapplied by judges in the companies courts. The ratio in *See Teow Guan* was based on the Canadian Court of Appeal decision in *Re Rf Jowsey Mining Co Ltd* [1969] 2 OR 549; 1969 Ont Rep Lexis 152. But, the decision in *Re Rf Jowsey* did not bear the mark of unanimity. Jessup JA, a member of the appellate panel, dissented upon lucid and, in my view, compelling grounds. This is what he had to say — on the construction to be placed on the words ‘may make any interim or other order as is deemed just’ in (the Canadian) s 258 of the Corporations Act, RSO 1960, which is in *pari materia* with s 221(1) of our Companies Act 1965:

The broad effect of that section was stated by Neville J in *Re Bleviot Mfg Aircraft Co Ltd* (1916), 32 TLR 253 at p 255:

‘The words ‘just and equitable’ are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances.’

[18] And, he finally concluded:

In my opinion, the section (s 256(d) of the (Canadian) Corporations Act, RSO 1960) is in very broad terms with the intent that, at least as the term of a stay of proceedings, a Court may order the equitable remedy that is most just having regard to all the circumstances of the case and once it appears that *justice and equity require* the intervention of the Court in a company’s affairs. (Emphasis added.)

[19] With respect, I am completely *ad idem* with and prefer to adopt Jessup’s (JA) views on s 256(d) as it is a more cogent and eminently persuasive approach which is consistent with the equitable jurisprudence postulated in the manner s 256(d) was couched. It reads:

(d) where in the opinion of the court it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.

Notably, s 218(1)(i) of our Act is a prototype of s 256(d) of the Canadian Act and s 121(1) of the (English) Insolvency Court of Appeal Act 1986. With the greatest respect, I think the Court of Appeal in *See Teow Guan* should not have adopted the views of the majority in *Re Rf Jowsey* considering the wide import of

- A** the words ‘make any interim or *other order as it thinks fit*’ expressed in s 221(1) read in conjunction with the ‘just and equitable’ spirit encompassed in s 218(1)(i) of our Act. To hold otherwise would be to read into s 221(1) an unwarranted restriction not intended by the Legislature. Entirely pertinent to the focus of this discussion is the fact that in *See Teow Guan* (High Court) the Petitioner had presented a petition for the company to ‘be wound up by the court under the provisions of s 218(1)(f) and/or (i) of the Companies Act 1965’.
- B**

[20] Be that as it may, I stand bound to adopt the ratio in *See Teow Guan*. This is however not the end of the matter as the next question which this court would have to determine is: whether in recording the consent order on 18 April 2000 (sought to be set aside) the court had exercised its adjudicatory function, which happened in *See Teow Guan* and in *Re Rf Jowsey Mining Co Ltd*. An adjudicatory function is essentially predicated upon a real dispute. For the above reasons, I would hold that *See Teow Guan* (which I had, in *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493, occasion to express contrary views on another aspect of its ratio) is not applicable to the present case and can be distinguished on its facts. Most importantly, the observation therein has nothing to do with the issue of validity of consent orders. In *See Teow Guan*, the High Court in the exercise of its adjudicatory function in a contested matter made an order for the distribution of assets subsequent to the making a winding up order. The Court of Appeal quite rightly said that distribution of assets in the course of a winding up was the liquidator’s function, not the court’s. Hence, the High Court ought not to have made that order. In the present case, the court was not exercising its adjudicatory function, simply because Mohd Ghazali J (as he then was) did not make any decision on a contested matter. Thus, in my judgment, the ratio decidendi in *See Teow Guan* has no bearing on the case at hand.

- F** **[21]** The presentation of the petition was the culmination of the dispute between the parties which was resolved. By recording the consent order, the court was merely giving due recognition (that was then mutually sought) and effect to a new agreement between the parties (see *Green v Rozen* [1955] 2 All ER 797). I would thus hold, as untenable and wholly without basis in law, the applicants’ implied concession that the court has jurisdiction to hear a winding up petition, but has no power to record a consent order on the same. This cannot be right as the High Court is a superior court of record and s 221(1) does not, in my view, debar the court from recording such order (see *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458, *Lee Kee Choong v Empat Nombor Ekor (NS) Sdn Bhd* [1975] 1 MLJ 134 and *KI Muhiudeen Rawther v KEP Abdul Kassim & Ors* [1959] MLJ 257).
- G**
- H**

[22] Further, when the parties agreed to record the consent order, they were creating a contract or compromise which was valid and binding, as a unanimous agreement between the parties. By having the terms of the compromise recorded as a consent order by the court, the agreement becomes a rule of court, that is, a super-added command.

- I** **[23]** It is noteworthy that there is a difference between a consent order or judgment and one to which the party against whom it is entered merely

submits. Unlike the latter, the former — where the compromise has been embodied in a consent order or judgment — affords evidence of the contract upon which it is based and which has been made a rule of court (see *Re Shaw* [1918] P 47 (CA), *Croft v Croft* [1922] 38 TLR 648 and *Aspden (Inspector of Taxes) v Hildesley* [1982] 1 WLR 264). Indeed, such order has been said to be buttressed by superadded command of a judge (see *Lievesley v Gilmore* [1866] LR1 CP 570, *Worthington & Co v Abbot* [1910] 1 Ch 588; *Brister v Brister* [1970] 1 WLR 664 and *Jessel v Jessel* [1979] 1 WLR 1148 (CA)). See also *Horizon Technologies International Ltd v Lucky Wealth Consultants Ltd* [1992] 1 WLR 24 (PC) and *The Law and Practice of Compromise* by David Foskett (4th Ed — Sweet & Maxwell 1996) at p 238.

[24] The leading authority on the matter (see *Marsden v Marsden* [1972] Fam Law 280) indicates that the power to interfere will not be exercised (or does not exist) after any consent order or judgment has been perfected (*Marsden v Marsden*; Watkins J regarded this as ‘well settled law’) save in exceptional circumstances such as illegality, fraud or a sufficient mistake of fact — none of which grounds the applicants in the instant case have shown (see *Smith v Shirley & Bayliss* [1875] 32 LT 234, *Tong Lee Hwa & Anor v Chin Ah Kwei* [1971] 2 MLJ 75, *Binder v Alachouzos* [1972] 2 All ER 189 and *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors*). After the perfection of the order or judgment, the question of excess of authority cannot be raised to invalidate the compromise, though a sufficient mistake of fact, raised in fresh proceedings, may, in certain exceptional cases, operate to do so. The procedure for seeking a judicial rescission of a compromise that has been made a rule of court is identical to that required in relation to any other contract. If the order has been perfected a fresh action is needed seeking a declaration of invalidity or an order setting aside the compromise or agreement with consequential directions. A fresh action is needed for reasons, inter alia, to allow the other side, where appropriate, to counterclaim.

[25] It is common ground that the consent order was not perfected at the time of this notice of motion (under the existing petition) was filed. Yet nevertheless, since learned counsel for the petitioner, Dato’ RR Sethu, had also raised an objection on the mode of procedure that the applicants’ solicitors had adopted to move this court to set aside the consent order, a brief discussion on this aspect of the matter would be in order, more so as Encik Hamid Sultan bin Abu Backer for the applicants had made no riposte to this aspect of the objection. Prior to the perfection of a consent order or judgment, there is a limited jurisdiction to set aside such an order or judgment. The rule appears to be that the court will interfere prior to perfection of a judgment or order only if the evidence indicates that counsel was acting in excess of authority, either deliberately or inadvertently, or was labouring under a mistake which would vitiate the agreement. A party seeking to set aside such unperfected consent order may do so by summons or notice of application prior to or contemporaneously with perfection. I would thus hold that the applicants were not amiss on the procedural

- A** requirements in making their application by this notice of motion; encl 20 is properly before me for determination.

Other considerations

- B** [26] The withdrawal of the petition (the part of the order intended by applicants to be retained) would have entailed the company, which is a going concern, to suffer liabilities and the creditors to acquire third party rights against the company. In such situation, this court is reminded of the following forceful and unequivocal caveat delivered by Willis J in *Hammond v Schofield* (1891) IOB 453:

- C** I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability. Courts exist, as it seems to me, not to take away people's rights or increase their liabilities, but not enforce them, and I base my judgment upon this broad principle.

- D** [27] Indeed, a judgment or order may not be set aside by consent of the parties if it would prejudice third party rights (see *The Belcairn* (1885) 10 PD 161).

- E** [28] Prior to the filing of this motion, there was part performance of the consent order, in that the petitioner deposited his share certificates and the duly executed memorandum of transfer with his solicitors, and the applicants and the other opposing contributories had made two payments. The applicants and the other contributories then defaulted in the payment of the third and subsequent instalments. Hence, in my view, the applicants, by the present motion are attempting to renege from the consent order and to get out of their obligations to perform the agreed terms of the consent order. And, the grossly inordinate delay of 14 months in filing the present motion, bereft of any explanation, is in my judgment fatal to their belated challenge of authority, a fortiori after the order had entailed part performance of the recorded compromise (see *Teh Eok Kee & Anor v Tan Chiah Hock & Anor*).

- G** *Conclusion*

[29] After careful consideration of the affidavits and lengthy submissions put in by both sides, I dismissed the applicants' application vide encl 20 and ordered the applicants to bear the costs of the application personally.

- H** [30] I conclude with the words of Phillimore LJ in *Binder v Alachouzos*:

This is indeed a remarkable appeal. No one could suggest that it is in any way cluttered with merits.

Application dismissed.

- I** Reported by Sivapragasam Kumaran